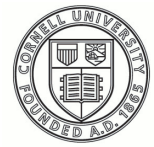

8-10-1977

State of New York Public Employment Relations Board Decisions from August 10, 1977

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from August 10, 1977

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#2A-8/10/77
COUNTY OF TOMPKINS, Respondent,	
-and-	CASE NO. U-2372
CIVIL SERVICE EMPLOYEES ASSOCIATION, TOMPKINS COUNTY UNIT, Charging Party.	

DECISION AND ORDER

This matter comes to us on exceptions of Tompkins County from a hearing officer's decision finding a violation of §209-a.1(d) of the Taylor Law[1/] in that it adopted a resolution providing for reimbursement of "moving expense" costs for certain new employees within the CSEA negotiating unit.[2/]

In an opinion issued on May 8, 1967, which was before the Taylor Law took effect, the state comptroller determined that a county may, pursuant to an appropriate local law, reimburse an officer or employee for his expenses in moving into that county in order to accept the office or employment (23 Op. St. Compt. #293). Two years later Tompkins County enacted such a local law.[3/] It established a moving expense policy. That policy required a resolution of the County Board of Supervisors for it to have any impact. Such a resolution was adopted afterwards.[4/] It is applicable to candidates for specified positions within the negotiating unit represented by CSEA who are residing outside Tompkins County and would be relocating to a residence within the county should they accept an offer of employment. As an inducement

to come to Tompkins County to work, such person would be reimbursed for the relocation expenses. The critical provision of the County resolution is

> "If, for any reason, the individual's employment with the County is terminated within one year from the date that individual reports for work, the individual shall be responsible for repayment to the County for the full payment amount."

A state law authorizes reimbursement for moving expenses upon initial appointment to State service (St.Finance Law §6-d) which has one significant difference. It provides that the employee must refund the money paid to him for his moving expense "...in the event that he resigns or voluntarily separates from the position to which he was initially appointed within one year of the effective date of such appointment." The difference is that the County resolution requires a refund regardless of the reason for the job applicant's termination. It would be due even if the employee is discharged or laid off.

The charge herein was filed three weeks after the adoption of the resolution by the Tompkins County Board of Supervisors.

In its exceptions, Tompkins County argues, first, that CSEA waived its right to negotiate over the details of a moving expense policy. The basis for this proposition is that the moving expense policy was first adopted in 1969 and CSEA has never sought negotiations on this subject since then. We reject this argument. "The waiver by an employee organization of its statutorily protected right to negotiate an agreement must be an explicit one.", Matter of City of Mount Vernon, 5 PERB ¶3057 at p. 3101 (1972). The failure of an employee organization to make a demand relating to a term and condition of employment at one point in time does not constitute a waiver of its right to negotiate over that subject in the future. Neither does it constitute a waiver of its right to object to

unilateral action by the public employer regarding such term and condition of employment.

The second basis for Tompkins County's exceptions is that reimbursement of moving expenses of a successful candidate for employment is not a term and condition of employment of employees within the negotiating unit; therefore, Tompkins County did not violate its duty to negotiate in good faith when it adopted such a practice unilaterally. This proposition does not justify the county's conduct, which went beyond the reimbursement of moving expenses to successful candidates for employment. The resolution of the Board of Supervisors conditions the right of the successful job applicant to reimbursement for moving expenses upon his continuing in the employment of Tompkins County for one year; thus, it is compensation not only for taking the job, but also for performing satisfactorily in it for one year.

Compensation for satisfactory performance in a job is a term and condition of employment. It makes no difference that such compensation was agreed upon before the successful job applicant was hired or that it was reimbursement for expenses incurred in the taking of the job. The U.S. Court of Appeals (5th Circuit) dealt with a similar question in NLRB v. Laney and Duke Co., 369 F2d 859 (1966), 63 LRRM 2552. That case dealt with an employment application form that required extensive personal data about the job applicant and required the applicant to consent to polygraph tests at the company's request or to resign upon his refusal to do so. The Court found that the request for the personal information was appropriate, but that the consent to taking a polygraph test was not. It said that an employer could not "by unilateral action" require a job applicant to answer questions that could affect conditions of employment and (at pp 2555-6)

> "Since the application forms affected conditions of employment they were a legitimate subject of collective bargaining. The unilateral action of the company relating thereto constituted a refusal to bargain....The duty to bargain is a continuing one, and a union may legitimately bargain over wages and conditions of employment which will affect employees who are to be hired in the future."

Such is the case here, where the employer did provide a benefit to successful job applicants upon the condition that his "employment with the county is [not] terminated within one year from the date that individual reports for work...." In part, reimbursement for moving expenses as specified in the resolution of the Tompkins County Board of Supervisors is compensation for successful completion of one year's work on behalf of the County. Such compensation is a term and condition of employment and a mandatory subject of negotiations. A provision, such as that applicable to State employees, which would require a refund in the event that the employee resigned or voluntarily separated from his position within one year would be in the nature of a pre-hire inducement to the applicant to take a position with the County and remain with it for one year. The added requirement here, however, that the employee be required to make reimbursement even upon involuntary separation from service within one year makes the payment of money for moving expenses a term and condition of that first year of his employment.

ACCORDINGLY, WE AFFIRM the determination of the hearing officer that Tompkins County violated its duty to negotiate in good faith by unilaterally altering terms and conditions of

employment in violation of §209-a.1(d) of the Taylor Law, and

WE ORDER it to negotiate in good faith.

DATED: New York, New York
August 10, 1977

Robert D. Helsby, Chairman

Joseph R. Crowley

Joseph R. Crowley

Ida Klaus

Ida Klaus

FOOTNOTES

1/ Section 209-a.1(d) of the Taylor Law declares it to be an improper employer practice "...to refuse to negotiate in good faith with the duly recognized or certified representative of its public employees."

2/ The charge had been brought by the Tompkins County unit of the Civil Service Employees Organization (CSEA). A second specification of the charge was dismissed by the hearing officer. It alleged that Tompkins County had violated its duty to negotiate in good faith in that it had not made a timely wage offer during negotiations. There were no exceptions to the dismissal of this specification of the charge.

3/ Tompkins County, Local Law #4, 1969 states:

> "To authorize reimbursement of moving expenses to employees assuming positions in the County of Tompkins, be it enacted by the Board of Supervisors of Tompkins County, New York as follows:
>
> Section 1.
>
> Payment or reimbursement to officers or employees of their expenses of moving into the County of Tompkins so that they may assume positions of employment are hereby authorized in accordance with said local law.
>
> Section 2.
>
> Said reimbursement or payment of said moving expenses shall be authorized only when approved by the Board of Supervisors of the County of Tompkins by resolution duly adopted by the Board.
>
> Section 3.
>
> This law shall be effective immediately."

4/ The complete Resolution #229 of October 11, 1976, states:

Adoption of Moving Expense Policy

RESOLVED, on recommendation of the Budget and Administration Committee and a majority of the Personnel Committee that the following policy be adopted in conjunction with Local Law #4 - 1969 and Resolution #215 adopted November 13, 1969 to provide for reimbursement of moving expenses to new county employees.

1. Moving expense reimbursement will be applicable to only those instances where the individual resides outside Tompkins County and will be relocating to a residence within the County.

2. Moving expenses reimbursed will be limited to actual cost but not to exceed fifteen hundred dollars.

3. Moving expense reimbursement paid in accordance with this policy will be reduced by reimbursement from another source. Should full payment have already been made under this policy when an alternate source of reimbursement becomes available, the employee shall be responsible for repayment to the County for like amount, not to exceed the full payment made by the County.

4. If, for any reason, the individual's employment with the County is terminated within one year from the date that individual reports for work, the individual shall be responsible for repayment to the County for the full payment amount.

5. By policy, the following classifications will be eligible for moving expense reimbursement: all classifications Grade 18 and above and Library Director, Director of Nursing, Director of Rehabilitation Center (Meadow House), Director of Public Health Nursing, Hospital Plant Supervisor, Probation Director, Supervising Pharmacist, Airport Manager and County Home Superintendent.

6. The County will not ordinarily consider exceptions to the moving expense reimbursement policy above. Should highly unusual circumstances indicate that such a consideration should be examined, such request shall be presented in writing to the Personnel Committee and if approved will require approval of the Board of Representatives prior to any job offcer to the applicant.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-8/10/77

In the Matter of CITY SCHOOL DISTRICT OF THE CITY OF BINGHAMTON, N.Y., Petitioner-Employer, -and- BINGHAMTON CITY SCHOOL DISTRICT ADMINISTRATIVE-SUPERVISORY ASSOCIATION, LOCAL 23 SCHOOL ADMINISTRATIVE AND SUPERVISORS ORGANIZING COMMITTEE, AFL-CIO, Intervenor.	BOARD DECISION AND ORDER CASE NO. C-1425
In the Matter of CITY SCHOOL DISTRICT OF THE CITY OF BINGHAMTON, N.Y., Petitioner-Employer, -and- BINGHAMTON TEACHERS ASSOCIATION, Intervenor.	CASE NO. C-1426

On November 10, 1976, the City School District of the City of Binghamton, N.Y. (employer) filed a petition to remove department chairpersons and teacher consultants from a teachers' unit represented by the Binghamton Teachers Association (BTA). It also filed a second petition that day to include the department chairpersons and teacher consultants in the administrators' unit represented by the Binghamton City School District Administrators and Supervisors Organizing Committee, AFL-CIO (BASA).

A consolidated hearing was held on both petitions, during the course of which an agreement on the disposition of teacher consultants was reached. The remaining issue was the unit placement of the department chairpersons. The Director of Public Employment Practices and Representation issued a determination on June 1, 1977 that department heads are supervisors. Accordingly, he ordered their removal from the teachers unit and their inclusion in the administrators unit. BTA has filed exceptions to this determination. The employer and BASA have filed briefs in support of the determination.

The teachers unit was established in 1968. The department chairpersons were included in the unit at that time, pursuant to a stipulation between the employer and BTA. In many respects the terms and conditions of department heads are similar to those of the teachers and the department heads have indicated a preference for remaining in the teachers unit. On the other hand, the Director concluded that the supervisory responsibilities of the department heads compels the granting of the petition that they be separated from the teachers. Among the circumstances that persuaded the Director are that department heads

> "have effective input concerning the employer's decision to hire, to continue employment of probationary teachers and to grant tenure. They too make teaching assignments, coordinate the work of their department, are responsible for the pedagogical training of their staff, participate in the budgeting process, review curriculum and materials, and usually are the first step of the grievance procedure."

Having reviewed the record, we confirm these findings of fact of the Director. We also affirm his conclusion that these facts establish the supervisory nature of the job of the department chairperson and require that the employer's petitions be granted. Discussion of a few of the factors on which the conclusion is based sufficiently demonstrates the validity of this conclusion. BTA's response to the finding that department heads have an effective role in the hiring of new teachers is that this is not a characteristic of supervision. Its

reasoning is that no employment relationship exists until after a candidate is hired; therefore, the act of hiring a candidate occurs prior to the time when a supervisor-subordinate relationship could be deemed to exist. This is a novel and unusual argument, but it is not persuasive. The power to hire, and hence to determine the basic establishment of the employment relationship, has long been recognized as one of the essential indicia of supervision. We accept the validity of that view.

BTA responds to the finding that department chairpersons evaluate teachers by saying that the evaluation of tenured teachers is pro forma and, therefore, of no significance. The responsibility of department heads to evaluate probationary teachers is dismissed as being de minimis because the percentage of probationary teachers on the faculty of the employer is small. It also complains that some of the responsibilities of the chairpersons to evaluate teachers were added by the respondent in 1970 and others in 1975. According to BTA, these added duties have been created by the employer and they do not justify relieving the employer of any management problems created by its own conduct. In the absence of a showing here that the added duties were a fiction and imposed solely for the purposes of defeating the policies of the Act, this argument, too, fails to persuade us that the existing unit should be retained intact. Evaluation of subordinate employees, even if resulting only infrequently in adverse action against them, is nevertheless an important factor in guiding teachers to enhance the quality of their instruction. Their role in evaluating probationary teachers, as the record shows, is particularly effective in the granting or withholding of tenure and thus in the determination of the continued employment status of the probationers.

In view of these circumstances, it is unnecessary for us to discuss the implications of the other findings of fact of the Director. We affirm his determination that department chairpersons be removed from the teachers' unit and included in a unit with other supervisors as follows:

Included: Department heads, teacher consultants, administrative assistants-senior high, assistant principals-junior high, assistant principals-senior high, head nurse teacher, elementary principal, junior high principals, senior high principals, director of attendance.

Excluded: All other employees.

THEREFORE, WE ORDER that an election by secret ballot should be held under the Director's supervision among the employees in the unit determined above to be appropriate and who were employed by the employer on the payroll date immediately preceding the date of this decision.

WE FURTHER ORDER that the employer shall submit to the Director, BTA and BASA within seven days from the date of receipt of this decision, an alphabetized list of all employees within the unit determined above to be appropriate who were employed by the employer on the payroll date immediately preceding the date of this decision.

DATED: New York, New York
August 10, 1977

ROBERT D. HELSBY, Chairman

JOSEPH R. CROWLEY

IDA KLAUS

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2C-8/10/77

In the Matter of

EAST RAMAPO CENTRAL SCHOOL DISTRICT,

Respondent,

BOARD DECISION AND ORDER

-and-

EAST RAMAPO TEACHERS ASSOCIATION

Charging Party.

CASE NO. U-2124

The charge herein was filed by the East Ramapo Teachers Association (teachers association) on May 20, 1976. It alleges that the East Ramapo Central School District (school district) violated §209-a.1(d) by refusing to negotiate in good faith in that it unilaterally

1. eliminated the positions of 13 library media specialists from the negotiating unit and transferred their duties to non-unit personnel, i. e., "librarian II", a newly created civil service position;

2. eliminated the positions of 37 department chairmen (in departments with less than ten teachers) and transferred all or part of their duties to other teachers or administrative personnel;

3. eliminated 3.9 junior high school language teachers and increased the workload of the remaining foreign language teachers; and

4. refused, upon demand, to negotiate the impact of these reductions in staff.

After a hearing which lasted seven days, the hearing officer determined that the first specification of the charge had been substantiated by the evidence, but that the remaining three had not.

The First Specification of the Charge

With respect to this specification, he found that, as charged, the school district eliminated the position of library media specialist and transferred

the duties of that position to a newly created, non-unit position of librarian II. He determined that the position of librarian II carried a lower salary than did the position of library media specialist and that the school district made the change in order to avoid its obligation under the existing agreement regarding the salaries of the library media specialists. The school district had defended its conduct by alleging that the job of library media specialist was significantly different from that of the position of librarian. As stated in the school district's brief, "The major and critical difference is that the library media specialist is a 'teacher-librarian', while the librarian II is essentially a 'librarian'". The hearing officer rejected this allegation and concluded that "the prior functions, duties and responsibilities [of the library media specialists] were all to be continued essentially unchanged." He concluded that the school district's "unilateral action of transferring the functions formerly performed by library media specialists to non-unit employees without agreement of the charging party constitutes a violation of §209-2.1(d) of the Act."

A second defense to this specification of the charge was that the school district had not refused to negotiate with the teachers association about its decision to eliminate the position of library media specialist and to substitute for it the position of librarian II. In support of this proposition, it argued that there had in fact been negotiations and that it was the teachers association which broke them off. The hearing officer, however, determined that during the negotiations the school district had been unwilling to even consider any proposal that might involve the reinstatement of the position of library media specialist and had approached negotiations without any willingness to reach any agreement. Moreover, he noted that the school district acted unilaterally without first exhausting the conciliation procedures provided by §209 of the Taylor Law.

The school district has filed exception to that part of the hearing officer's decision which finds it in violation of the first specification of the charge. Having reviewed the record and heard the parties' arguments, we confirm the hearing officer's findings of fact and conclusions of law on this point. Although there is a claim in the record that the duties of the two positions were not intended to be identical, the evidence establishes that no significant differences between the two positions were ever contemplated by the school district. For example, the school district's director of personnel testified, among other things, that there had never been any determination or direction to reduce the library services available to the students of the schools. Moreover, inasmuch as a resolution of this factual issue involves an evaluation of testimony, we rely heavily upon the judgment of the hearing officer, who had an opportunity to observe the witnesses in making that evaluation.

The record thus supports the conclusion of the hearing officer that the school district never negotiated in good faith about its decision to transfer the job responsibilities of the library media specialists to the librarians.

The Remaining Three Specifications of the Charge

The teachers association filed exceptions to so much of the hearing officer's decision as dismissed the remaining three specifications of the charge. In support of the second specification of its charge, the teachers association argues that the primary functions of the department chairmen had been transferred to non-unit staff and that the hearing officer's finding concerning the first specification should also have been made as to the second. However, the hearing officer found that much of the work that had been assigned to the department chairmen was eliminated along with their jobs, and that while some of the

functions of the department chairmen were retained, these were not sufficient to bring the facts within the frame of reference of the first specification of the charge especially since the retained functions were merely incidental to the primary, but eliminated, work of the department chairmen in the areas of supervision, administration, and development and implementation of curricula. In support of the third specification of the charge, the teachers association argues that there was no essential change in the foreign language curriculum or program of the school district and that the elimination of 3.9 junior high school language teachers was, therefore, a unilateral change in terms and conditions of employment of the language teachers. The hearing officer rejected this proposition because the evidence indicated that the junior high school foreign language program was substantially reduced in that certain seventh grade foreign language classes were eliminated.

The hearing officer's findings of fact and conclusions of law on these two specifications are affirmed. Moreover, unlike the circumstances of the first specification, the duties of foreign language teachers were not transferred to non-unit employees. Here there was no duty to negotiate over the elimination of the foreign language teachers' positions but only as to the impact of that action. (Matter of City School District of the City of New Rochelle, 4 PERB ¶3704).

The hearing officer rejected the fourth specification of the charge, to wit, that the school district refused to negotiate the impact of its unilateral decision to reduce staff. In its exception, the teachers association interprets the hearing officer's adverse decision as being premised upon a finding of a waiver of its right to negotiate the impact of the unilateral changes and it argues that there is no record evidence of any explicit waiver on its part. This is a misinterpretation of the hearing officer's decision. Instead, he did not reach the question of waiver, a subject that might have implications for the future obligations of the parties; rather he merely determined that the

school district had never refused to negotiate concerning the impact of its unilateral decisions because the record did not establish that the teachers association, which had a fixed negotiating strategy of attempting to prevent any change whatsoever, ever followed up its written demand in May for such negotiations.

Having confirmed the hearing officer's findings of fact and conclusions of law on all essential matters, we determine that the school district violated its duty to negotiate in good faith by its unilateral action of transferring the functions formerly performed by library media specialists to non-unit employees without having first been willing to negotiate about its decision to do so, and

WE ORDER the school district to negotiate in good faith with respect to this matter.

In all other respects, the charge herein is dismissed.

Dated: New York, New York
August 10, 1977

ROBERT D. HELSBY, Chairman

JOSEPH R. CROWLEY

IDA KLAUS

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD #2D-8/10/77

In the Matter of

LYNBROOK POLICE BENEVOLENT ASSOCIATION, :

Respondent, BOARD DECISION AND ORDER

:

- and -

CASE No. U-2635

INCORPORATED VILLAGE OF LYNBROOK, :

Charging Party.

:

The charge herein was filed by the Village of Lynbrook (Village) on April 6, 1977. It alleges that the Lynbrook Police Benevolent Association (PBA) violated its duty to negotiate in good faith by insisting upon five demands that are not mandatory subjects of negotiation and by being unwilling to accommodate to the idea of any compromise. At the request of the parties, we are processing this case under §204.4 of our Rules. This procedure, which leads to an expedited determination, dispenses with the intermediate decision of a hearing officer.

The parties entered into negotiations for an agreement to succeed one that expired on May 31, 1975. Eventually an impasse was declared and the dispute was submitted to a factfinder on November 5, 1976. PBA's demands remained unchanged from the time of their initial presentation except that it raised its wage demand from eight and one-half to nine and one-half percent following an arbitrator's award to the Nassau County PBA of a nine and one-half percent wage increase for that County's 1975 contract. The factfinder's report in the instant dispute was issued on March 12, 1977. It was rejected by the PBA, which continued to adhere to its original demands as revised by the increased wage rate proposal. On March 18, 1977, PBA filed a petition under §209.4 of the

Taylor Law for interest arbitration and the Village responded by filing this charge.

DISCUSSION

GOOD FAITH NEGOTIATIONS

We first considered the nature of the duty to negotiate in good faith in Matter of Southampton PBA, 2 PERB ¶3011 (1969), in which we said (at p. 3274):

> "The duty to negotiate in good faith means that both parties approach the negotiating table with a sincere desire to reach an agreement. Thus, good faith is a matter of intention."

This analysis is similar to the one applicable under the National Labor Relations Act. For example, in NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960), the U. S. Supreme Court said (at p. 485):

> "Collective bargaining then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract."

In NLRB v. Reed & Prince Mfg. Co., 205 F. 2d 131 (1953), the First Circuit said (at p. 135):

> "...While the Board cannot force an employer to make a concession on any specific issue or to adopt any particular position, the employer is obligated to make some reasonable effort in some direction to compose his differences with the union if §8(a)5 [the obligation to bargain in good faith] is to be read as imposing any substantial obligation at all."

The availability of compulsory interest arbitration under §209.4 of the Taylor Law provides a last resort for resolution of a dispute after the parties themselves have been unable to reach agreement through good-faith bargaining. It is not to be used to preclude genuine bargaining by a fixed take-it-or-leave-it attitude, which freezes the issues from the outset and seeks to force the other side to yield to the demands as presented or have them turned over for resolution to an arbitrator.[1/] This is plainly what PBA did in

---

1/ Such a take-it-or-leave-it approach to negotiations is wrong. (See NLRB v. General Electric Co., 418 F. 2d 736 [2nd Cir., 1969]).

the instant case; and in doing so it violated its duty to negotiate in good faith. In Matter of Town of Haverstraw, 9 PERB ¶3063 (1976) we said (at p. 3109):

> "Interest arbitration is not, and was not, intended as an alternative to, or substitute for, good faith negotiations. Rather, it is a procedure of last resort in police and fire department impasse situations when efforts of the parties themselves to reach agreement through true negotiations and conciliation procedures have actually been exhausted."

DEMANDS ALLEGED TO BE NONMANDATORY

1. "All employees shall receive an increase in their base salaries, exclusive of longevity or other entitlements, of nine and one-half (9 1/2%) percent."

The Village argues that this is in fact a demand for "parity" with the Nassau County police and, as such, not within the scope of mandatory bargaining. In support of this proposition, it points out that the demand was increased from eight and one-half to nine and one-half percent when the Nassau County police received a raise. It also notes that many of the other substantive demands of PBA are identical with the terms and conditions of the Nassau County police. The theory of its charge, as stated in the record, is "...the thrust of our entire case is here, identity and parity, with whatever happens to Nassau County PBA happens to the Lynbrook PBA." We do not agree with the characterization of the Village. In Matter of City of Albany, 7 PERB ¶3079, the majority of this Board observed (at p. 3146):

> "...There is a relationship between the settlement of a public employer with an employee organization representing some of its employees and the settlement of another employee organization representing other employees. Settlements often follow established patterns...This is not inappropriate."

In that case, the Board made it clear that a "parity" clause as to which an employer would not be obligated to negotiate is one requiring that specific benefits subsequently granted by that employer to another labor organization for employees in another unit will ultimately be given to the

proponent of the clause during the life of its agreement. In Matter of City of New York, 10 PERB ¶3003, the majority of this Board explained why the inclusion of a "parity" clause contravenes the statutory scheme, and thus, found it to be a prohibited subject of negotiation with an employee organization. There the employer had already entered into an agreement with one organization containing a provision that any benefit it would later accord to another organization for a different unit would ultimately be extended to the first unit. This would not be the effect of PBA's demands in the instant case. They are direct substantive demands for specific benefits. Although the level and nature of the benefits specified in the demands are derived from or may parallel the terms of agreement of another employee organization, they are not sought to be made subject to automatic adjustment in the event that the other employee organization negotiates a more favorable agreement thereafter. Moreover, here the other employee organization represents employees of a different public employer. Hence, the right of that other organization to negotiate with that other employer is, in any event, not impaired by the level of benefits that might be negotiated by the parties in the instant case. Essentially, what we have here is the kind of "pattern" bargaining that was approved as mandatory in our Albany decision.

2. "If an employee requests that he be assigned to rotating tours of duty and is refused such request by the Chief of Police, he shall automatically become entitled to the additional compensation he would have earned if such request had been granted."

Most police officers are assigned to rotating tours of duty. A few are not; they are assigned to special details. In most respects work in the special details is more attractive. To compensate for this, police officers assigned to rotating tours earn 17 days pay more than officers assigned to

special details. Some of the police officers assigned to special details may prefer the advantages of their assignments, others may prefer the additional compensation received by those on rotating tours.

This is not a mandatory subject of negotiation. It is not a demand that all qualified employees be entitled to more favorable work assignments on a rotating basis, which is a mandatory subject of negotiation.[2/] Neither is it a demand for increased compensation for all persons assigned to special details, which is also a mandatory subject of negotiation. Rather, it is in the nature of a penalty to be exacted merely because an officer has been denied an opportunity to perform alternative services which requires a higher rate of pay. PBA does not object to the rate differential on the merits. Thus, the demand is not for increased compensation for work performed but for additional money to be paid for work that is not to be performed.

3. "Termination Pay (Lump Sum at Retirement)...An employee, his named beneficiary, or if none, his legatee or devisee, shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of five (5) days for each year of completed service."

The Village refusal to negotiate over this demand because it deems it to be a demand for a retirement benefit which is prohibited by §201.4 of the Taylor Law occasioned a charge by PBA in a companion case decided today. In our decision in that case, we determined that this demand is a mandatory subject of negotiation. The reasons for that conclusion are stated in our opinion in that case.

2/ Matter of Buffalo PBA, 9 PERB ¶3024 (1976), reversed on other grounds by the Sup. Ct., Erie Co., 9 PERB ¶7020 (1976), not officially reported.

4. "Hospitalization (Deceased Employees)...If an employee with one (1) or more years of service or a retired employee deceases, his immediate family at the time of his demise shall receive the same hospitalization as presently provided for active employees at no cost to the survivors. The employee's spouse shall be given the benefit of this section until she re-marries, and the employee's children shall be given the benefit of this section until the age of nineteen (19) years unless attending college, in which case the age limit shall be twenty-three (23) years, or specifically qualified because of mental retardation, etc., in which case there shall be no age limit. This section shall be retroactive so as to provide this benefit for all employees regardless of the date of their demise and whether it occurred while an active or retired employee."

The Village asserts that this is a nonmandatory subject of negotiation insofar as it relates to hospitalization benefits that will be received by the beneficiaries of police officers who are already retired and not, therefore, employees of the Village. It is correct. In Matter of Troy Uniformed Firefighters Association, Local 304, IAFF, 10 PERB ¶3015, we determined (at page 3034) that a public employer was "under no statutory duty to negotiate with respect to benefits for persons who are no longer public employees at the time of the negotiations."

The Village also contends that this is not a mandatory subject of negotiation insofar as it relates to hospitalization benefits that will be received by a beneficiary of current police officers who die after they retire. The reasoning of the Village is that this would be a retirement benefit that is prohibited by §201.4 of the Taylor Law. This is similar to the position of the Village on demand No. 3. It, too, is rejected for the reasons stated in the companion case.

5. "Continuation of Benefits Clause. Upon the expiration of the contract, all terms, conditions, benefits, etc. shall continue until a new contract is signed."

In both Matter of Troy Uniformed Firefighters Association, Local 2304, IAFF, supra and Matter of Local 294, IBT, 10 PERB ¶3007, we determined that such a clause is a mandatory subject of negotiation. The Village would have us reverse those determinations because of the decision of the Appellate Division, Fourth Department in Matter of Niagara Wheatfield Association, 54 App. Div. 2d 498 (1976), a school district case. In that case, the court reversed an arbitration award in favor of the Niagara Wheatfield Administrators Association which extended the compensation index of an expired contract indefinitely. The contract language in that case was comparable to the language of the demand here. The court did not declare the agreement illegal, as the Village argues; rather, it remanded the matter to the arbitrator, stating:

> "We conceive that an award favorable to petitioner, albeit less so than the vacated award, could be made by the arbitrator by determining, for example, that paragraph D of article II of the agreement shall remain in effect for a reasonable time after June 30, 1975, in which the board and petitioner may negotiate a new contract...." (emphasis added)

This is an indication that the court did not conclude that a continuation clause is inherently bad. Instead, it concluded that the continuation clause negotiated by the Niagara Wheatfield Association was bad insofar as the arbitrator interpreted it as applying indefinitely and, thus, for an unreasonably long period of time. This is a problem in the case of school district negotiations, for which the Taylor Law does not assure finality. In the instant case, however, the negotiations impasse is subject to interest arbitration under ¶209.4 of the Taylor Law. This was the situation in both the Troy and the Local 294, IBT cases. The availability of arbitration assures the parties of either a new agreement, or of an arbitration award, within a reasonable time after the expiration of a predecessor agreement.

ACCORDINGLY, Lynbrook PBA should withdraw its demands for hospitalization for beneficiaries of employees who have already retired. It should also negotiate in good faith with the Village on all its other demands. The Director of Conciliation should render additional mediation service in order to assist the parties to effect a voluntary resolution of the dispute. In thirty days, he should report to us whether, in his opinion, efforts to achieve a voluntary settlement clearly have been, or will be unsuccessful. At that time we will consider whether the dispute is appropriate for arbitration.

NOW, THEREFORE, with respect to those matters that we found PBA not to have negotiated in good faith,

WE ORDER it to do so, and with respect to all other matters, the charges herein are dismissed.

Dated: New York, New York
August 10, 1977

Joseph R. Crowley

Joseph R. Crowley

Ida Klaus

Ida Klaus

I dissent from so much of the decision as determines that Demand No. 2 is not a mandatory subject of negotiation. It is a demand for premium pay for employees who deem their job assignment to be less desirable than an alternative assignment and are denied the opportunity to be given such an alternative assignment. The employer contends the demand is nonmandatory because it interferes with its right to schedule its work force. This contention is not persuasive. We have often ruled that a demand that would restrict the right of a public employer to deploy its employees is not a mandatory subject of negotiation, but that the impact of the employer's unilateral action is. The demand herein is one that goes to the impact of the

Village's unilateral determination regarding the scheduling of its police officers. It is not significantly different from demands for premium pay for overtime and split shifts or for minimum guarantees for employees who are called to work when they are not normally scheduled.

Dated: New York, New York
August 10, 1977

ROBERT D. HELSBY, Chairman

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of INCORPORATED VILLAGE OF LYNBROOK, Respondent, -and- LYNBROOK POLICE BENEVOLENT ASSOCIATION, Charging Party.	#2E-8/10/77 BOARD DECISION AND ORDER CASE NO. U-2317

This matter comes to us on the exceptions of the Village of Lynbrook from a hearing officer's decision finding it in violation of §209-a.1(d) of the Taylor Law[1] for having unilaterally discontinued, in part, payments of "termination pay" called for by a provision of an expired collective bargaining agreement while the parties were in the process of negotiating a successor agreement.[2] The Village did not fully comply with the "Termination Pay" provision because it interpreted the language added to §201.4 of the Taylor Law

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1 This section of the Act makes it an

> "improper practice for a public employer or its agents deliberately...(d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees."

2 At issue is the following provision of an agreement between the Village and the PBA, which agreement expired on May 31, 1975:

> "J. Termination Pay. On separation from service after twenty (20) years, for any reason, other than cause, or upon the death in service of any employee...such employee or his legal representative shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of four (4) days for each year of completed service..."

by §6 of Chapter 382 of the Laws of 1973[3] as prohibiting such compliance.

On August 20, 1976, the Village of Lynbrook (Village) sent a letter to members of the Lynbrook Police Department stating that:

> "Pursuant to the prohibition set forth in Section 6 of Chapter 382 of the Laws of 1973...no termination leave or cash entitlement therefor would be accrued or paid to any employee of the Lynbrook Police Department for the years of service commencing June 1, 1973."

This policy was made effective commencing October 1, 1976. The charge was filed by the Lynbrook Police Benevolent Association (PBA) after a police officer retired on September 30, 1976, following twenty years of service, and was paid termination pay for service only to May 31, 1973. However, a police officer who retired on January 2, 1976 (after the expiration of the collective bargaining agreement on May 31, 1975, but prior to the Village's change of policy) received full termination pay in accordance with the agreement.

The hearing officer found that termination pay is not prohibited by §201.4, that it is a mandatory subject of negotiation and that when the Village unilaterally changed its practice during a period when a successor agreement was being negotiated, it violated its duty to negotiate in good faith. Having considered the record and briefs, we affirm the determination of the hearing officer.

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3 Section 201.4 of the Act, as amended in 1973 by the addition of the underlined language, defines terms and conditions of employment as:

> "4. The term 'terms and conditions of employment' means salaries, wages, hours and other terms and conditions of employment <u>provided, however, that such terms shall not include any benefits provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.</u>" (emphasis supplied)

If termination pay, such as involved in this case, is prohibited by §201.4, it can only be so by virtue of the phrase, "payment to retirees or their beneficiaries". The Village urges that, inasmuch as it has a twenty-year retirement plan pursuant to §384-d of the Retirement and Social Security Law and that since termination pay is available only upon separation from service after twenty years, the monies would be paid to "retirees". The Village apparently recognizes (and concedes in its brief) that it would be obligated to make full termination payments to police officers who separate from service without retiring, but distinguishes such payments on the ground that they would not be to "retirees". It is likely, but not necessary, that those who receive termination pay under the agreement will do so upon retirement. It is possible for an employee to receive the benefits of this termination pay provision without applying for retirement under the State Retirement System. Termination pay and other lump-sum payments for accumulated vacation or sick leave are related to the retirement system only by virtue of their effect upon the final average salary base. Section 431 of the Retirement and Social Security Law is designed to prevent possible abuses by prohibiting the inclusion of such payments made at the time of retirement in the salary base for computation of retirement benefits.

Section 201.4 prohibits negotiation of "retirement benefits" which, in addition to benefits provided by a public retirement system, would include such matters as retirement allowances, pensions, annuities, disability allowances and other continuing payments after retirement which supplement pension payments. However, termination pay is one lump-sum payment in a fixed amount that is made at termination of service. It is a deferred payment for actual services rendered and is no different from lump-sum cash payments of accumulated vacation leave or accumulated sick leave. In Weber v. Levitt, 41 AD2d 452, aff'd 34 NY2d 797, the court recognized that

such termination pay was earned by a full twenty years of service and that each year of service contributed equally to the amount of pay so earned and that the termination pay could not be considered as being earned only in the twentieth year.[4]

For these reasons, we conclude that the termination pay provision is not prohibited by §201.4; rather, it is a mandatory subject of negotiation.

While the agreement expired on May 31, 1975, the issue -- as framed by the parties -- assumes that the termination payments continue during negotiations for a successor agreement, subject only to the Village's contention that §201.4 of the Taylor Law required it to reduce the amount of that payment. This is also evidenced by the fact that the Village has made termination payments subsequent to the expiration of the contract in one instance and, after its change of policy on August 30, 1976, it has made payments pursuant to the contract provision to another employee except for monies applicable to the years of service subsequent to June 1, 1973. Where the parties continue to apply the provisions of an expired agreement, their conduct may properly be construed as effectively extending the old agreement, at least as to the particular provisions involved, until such time as a new agreement is consummated.[5]

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4 See Board of Education, Town of Huntington v. Assoc. Teachers of Huntington, 30 NY2d 122; New York Public Interest Research Group, Inc. v. City of New York, Supreme Court, New York County, NYLJ 12/20/76.

5 See Board of Educ., Malone Central School Dist. and Malone Central Teachers Assn., 8 PERB ¶3043; Board of Educ., Malone Central School Dist. v. Malone Central Teachers Assn., 53 AD2d 417, 9 PERB ¶7526. The Appellate Division stated (53 AD2d at p. 419):

> "In Matter of Acadia Co. (Edlitz) (7 NY2d 348), the Court of Appeals found a valid written agreement to exist where the parties had orally agreed to extend a written contract containing an arbitration provision, taking the view that the parties' agreement to be bound by the written provisions of the old contract constituted sufficient compliance with statutory requirements. Although in the present case the old contract has not been extended, we see no reason why the principle of Acadia should not apply to those provisions of the prior contract

Under these circumstances, the unilateral change of policy by the Village constituted a violation of §209-a.1(d).

ACCORDINGLY, WE ORDER the Village of Lynbrook to negotiate in good faith.

DATED: New York, New York
August 10, 1977

ROBERT D. HELSBY, Chairman

JOSEPH R. CROWLEY

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5 (continued)

to which the parties have agree to be bound by continuing a course of conduct. Indeed, given the fact that the employer-employee organization relationship of the parties is bound to continue even in the absence of a final agreement and the importance of preserving harmony in that relationship, public policy demands that effect be given to those provisions which the parties by mutual conduct intend to apply in the governance of that relationship."

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2F-8/10/77
VILLAGE OF AKRON,	:	
Employer,	:	
- and -	:	CASE NO. C-1508
VILLAGE OF AKRON, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,	:	
Petitioner.	:	

BOARD DECISION

On May 26, 1977, the Village of Akron, Civil Service Employees Association, Inc., (herein referred to as the petitioner) filed, in accordance with the Rules of Procedure (herein referred to as the Rules) of the New York State Public Employment Relations Board (herein referred to as the Board) a timely petition for certification as the exclusive negotiating representative for all Village employees of the Village of Akron (herein referred to as the employer). Thereafter, the parties entered into a Consent Agreement providing that the appropriate unit is as follows:

Included: All Village Employees

Excluded: Chief of Police, Patrolman, Superintendent of Public Works, Village Clerk, and all part-time employees.

Pursuant to the Consent Agreement, a secret ballot election was held under the supervision of the Director on July 20, 1977. The results of

he election indicate that a majority of the eligible voters in the unit set forth in the Consent Agreement do not desire to be represented for purposes of collective negotiations by the petitioner.[1/]

THEREFORE, IT IS ORDERED that the instant petition should be, and hereby is, dismissed.

Robert D. Helsby, Chairman

Dated at New York, New York
This 10th day of August, 1977

Joseph R. Crowley

Ida Klaus

1/ Of the 16 votes cast, two were in favor of representation and 14 were cast against representation.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :

COUNTY OF MONROE AND MONROE COUNTY SHERIFF, :

Joint Employers, :

- and - :

SECURITY AND LAW ENFORCEMENT EMPLOYEES COUNCIL 82, AFSCME, AFL-CIO, :

Petitioner, :

- and - :

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., MONROE COUNTY CHAPTER, :

Intervenor. :

#2G-8/10/77

CASE NO. C-1367

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Security and Law Enforcement Employees Council 82, AFSCME, AFL-CIO

has been designated and selected by a majority of the employees of the above-named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Deputy sheriff guard 1, deputy sheriff guard 2, deputy guard corporal, deputy guard sergeant, deputy sheriff prison transport, deputy sheriff corporal prison transport, deputy sheriff technician 1, deputy sheriff technician 2, deputy sheriff identification supervisor, woman jailer, assistant jailer matron, matron jailer, deputy sheriff patrol, deputy sheriff corporal, deputy sheriff sergeant, deputy sheriff patrol airport, deputy sheriff corporal airport, deputy sheriff desk, deputy sheriff investigator, sergeant investigator, deputy sheriff civil and deputy sheriff assistant supervisor civil, who are regularly scheduled to work 25 or more hours per week.

Excluded: Seasonal, temporary and all other employees.

Further, IT IS ORDERED that the above-named public employer shall negotiate collectively with the Security and Law Enforcement Employees Council 82, AFSCME, AFL-CIO

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 10th day of August, 1977.

Robert D. Helsby, Chairman

Joseph R. Crowley

Ida Klaus

4841

PERB 58
(10-75)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#2H-8/10/77
CITY OF ROME, V.I.P. TRANSPORTATION, Employer,	
- and -	CASE NO. C-1492
AMALGAMATED TRANSIT UNION, LOCAL 582, AFL-CIO, Petitioner.	

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Amalgamated Transit Union, Local 582, AFL-CIO

has been designated and selected by a majority of the employees of the above-named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Bus Driver Part-time, Bus Driver Full-time, Automotive Mechanic and Mechanics Helper.

Excluded: All other employees of the employer.

Further, IT IS ORDERED that the above-named public employer shall negotiate collectively with the Amalgamated Transit Union, Local 582, AFL-CIO

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 10th day of August, 19 77.

Robert D. Helsby, Chairman

Joseph R. Crowley

4842

Ida Klaus

PERB 58
(10-75)